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No. 04-1488

IN THE

Supreme Court of the United States

CATHLEEN and ROBERT NOVAK,

Petitioners,

v.

TEITELBAUM, BRAVERMAN & BORGES, P.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK ABUSED ITS DISCRETION WHEN IT PROPERLY DECLINED TO CONSIDER PETITIONERS' APPEAL OF THE BANKRUPTCY COURT'S DECISION AND ORDER.

2. WHETHER THE UNITED STATES DISTRICT COURT SHOULD HAVE IGNORED PETITONERS' FAILURE TO PROPERLY READ RULE 9006 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE AND GRANTED JURISDICTION TO PETITIONERS' UNTIMELY APPEAL OF THE BANKRUPTCY COURT'S DECISION AND ORDER.

3. WHETHER RULE 9006 OF THE FEDERAL RULES OF BANKRUPTCY PROCEDURE APPLY TO A BANKRUPTCY CASE THAT PETITIONER ERRONEOUSLY STATES WAS CLOSED AT THE TIME.

4. WHETHER THE LOWER COURTS ABUSED THEIR DISCRETION IN REQUIRING AN ADHERENCE TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE IN DENYING PETITIONERS' CLAIMS OF EXCUSABLE NEGLECT.

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INTRODUCTION

The Petitioners, Robert and Cathleen Novak (hereinafter the "Novaks" or "Petitioners") ask this Court to grant their Petition for Writ of Certiorari and fail to present any issue warranting this Court's review. Each of the questions raised by the Petitioners' highlights Petitioners' failure to adhere to court rules and Petitioners' baseless desire to have the courts ignore Petitioners' disregard for the court rules.

First, the United States District Court for the Eastern District Court of New York dismissed the Novaks' appeal from the Bankruptcy Court Order ("Bernstein Decision" defined *supra*) in that the appeal was not timely filed in accordance with the Federal Rules of Bankruptcy Procedure (hereinafter "Bankruptcy Rules"), and the District Court, therefore, lacked jurisdiction to consider the Novaks' appeal.

Thereafter, the United States Court of Appeals for the Second Circuit affirmed the District Court order.

The Petition for a Writ of Certiorari fails to present any issue warranting this Court's review. As the decisions of the United States District Court and the Second Circuit Court of Appeals clearly reflect, the appropriate rules and caselaw have been applied. The United States District Court properly determined that it had no jurisdiction to hear an untimely appeal. The Court of Appeals for the Second Circuit properly affirmed the District Court's judgment. Thus, Respondent Teitelbaum, Braverman & Borges, P.C. asks this Court to deny the Novaks' Petition.

RELEVANT FACTUAL BACKGROUND

A. BANKRUPTCY CASE

On August 25, 1993, the Novaks, *pro se*, filed a voluntary joint Chapter 7 petition in the United States Bankruptcy Court for the Eastern District of New York. The case was converted to Chapter 11 by Order entered on January 18, 1996. By Order dated June 12, 1996, the Novaks retained the law firm of Teitelbaum, Braverman & Borges, P.C. (hereinafter "TBB" or "Respondent") as their counsel. On December 30, 1996, a Chapter 11 Plan of Reorganization was confirmed.

Thereafter, TBB filed an application for the allowance of fees and expenses for services rendered to the Novaks. An objection to the application was timely filed by the Novaks. After a hearing held on January 26, 1999, Bankruptcy Judge Francis G. Conrad awarded fees and expenses to TBB in an amount slightly less than requested.

On February 5, 1999, the Novaks appealed the Order allowing fees. By Order dated June 5, 2001, the Hon. Nina Gershon of the United States District Court for the Eastern District of New York granted the appeal and remanded the proceeding to the Bankruptcy Court for further hearings. Subsequently, Bankruptcy Judge Stan Bernstein issued a Memorandum of Decision and Order Allowing Final Application for Compensation of Debtors' Counsel in Part and Allowing Reimbursable Expenses (the "Bernstein Decision") on October 29, 2002. A separate Order Re: Final Compensation, which fixed the fees and expenses, was signed on the same date.

B. DISTRICT COURT RULINGS

On November 12, 2002, the Novaks filed a Notice of Appeal from the Bernstein Decision. On December 9, 2002, TBB filed a Motion to Dismiss the appeal on the grounds that the Novaks failed to timely file their Notice of Appeal from the Bernstein Decision, and the District Court, therefore, lacked jurisdiction to hear said appeal. By Order dated June 19, 2003, United States District Court Judge Nina Gershon, granted TBB's motion and dismissed the Novaks' appeal.

On July 8, 2003, the Novaks filed a "Motion to Re-hearing Arguments on Appeal," requesting that Judge Gershon rehear the Novaks' arguments. On July 31, 2003, Judge Gershon denied the Novaks' Motion to Rehear in a one-paragraph Order of the Court.

C. COURT OF APPEALS RULINGS

On August 14, 2003, the Novaks filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit. The Second Circuit Court of Appeals affirmed the judgment of the district court dismissing, as untimely, the Novaks' appeal from the Bernstein Decision. Thereafter, the Novaks filed a Motion to Rehear and that Motion was denied as well.

REASONS FOR DENYING THE PETITION

A. PETITIONERS' ORIGINAL APPEAL FROM THE BANKRUPTCY COURT DECISION WAS UNTIMELY, FAILING TO ADHERE TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

On November 12, 2002, the Novaks' appealed from the Bernstein Decision dated October 29, 2002. Bankruptcy Rule 8002(a) requires that an appeal be filed "within 10 days from the date of the entry of the judgment, order, or decree appealed from." Bankruptcy Rule 9006(a) explains that when computing a period of time allowed by the rules, the day on which the event occurs (i.e. entry of the order) is not counted, but the last day of the period to be computed is counted. Further, Bankruptcy Rule 9006(a) provides that weekends and holidays are included as part of the calculation of ten days. Thus, the time to appeal the October 29, 2002 order expired on Friday, November 8, 2002. Consequently, the appeal filed on November 12, 2002 was untimely. In addition, the Novaks did not file a motion or application to extend the deadline to appeal, as they could have done under Bankruptcy Rule 8002(b) and (c).

The United States District Court for the Eastern District of New York denied the Novaks' appeal as untimely. As stated in the *Matter of Ramsey*, "[a]n untimely notice deprives the district court of jurisdiction to review the bankruptcy court's order or judgment." *Ramsey* at 612 F.2d 1220, 1222 (9th Cir. 1980) (relying on *Matter of Estate of Butler's Tire & Battery Co., Inc.*, 592 F.2d 1028, 1034 (9th Cir. 1979); *In re W. T. Grant Co.*, 425 F. Supp. 565, 567 (S.D.N.Y. 1976), *aff'd*

without opinion; *Berger v. Rodman*, 559 F.2d 1202, 1206 (2d Cir. 1977)).

Then, when the Novaks' filed an appeal of the United States District Court Order with the United States Court of Appeals for the Second Circuit, the Second Circuit affirmed the judgment of the district court dismissing as untimely the Novaks' appeal of the Bernstein Decision.

This jurisdictional defect barring appellate review has been visited by many courts, and the decisions are consistent that failure to file a timely notice of appeal bars the appellate court from hearing the matter. *See In re Satellite Sys. Corp.*, 73 B.R. 610 (S.D.N.Y. 1987). *See also In re Delta Eng'g Int'l, Inc.*, 270 F.3d 584 (8th Cir. 2001); *Matter of Fellows*, 19 F.3d 245 (5th Cir. 1994); *Matter of Schultz Mfg. Fabricating Co.*, 956 F.2d 686 (7th Cir. 1992); *In re Sousa*, 795 F.2d 855 (9th Cir. 1986).

B. PETITIONERS' ARGUMENT IS BASED ON A MISAPPLICATION OF A CLEARLY-STATED FEDERAL RULE OF BANKRUPTCY PROCEDURE

There is no conflict between Bankruptcy Rule 9006 and Rule 6 of the Federal Rules of Civil Procedure (hereinafter "FRCP"). The Bankruptcy Rules "govern procedure in cases under Title 11 of the United States Code." FED. R. BANKR. P. 1001. Bankruptcy Courts are specialized courts established to hear bankruptcy matters under 28 U.S.C. § 157. In contrast, the FRCP "govern the procedure in the United States district courts in all suits of civil nature . . ." FED. R. CIV. P. 1. Thus, a different set of rules apply depending on the court hearing

the matter. Petitioners cannot argue that the Bankruptcy Rules conflict with the FRCP because the FRCP never apply to an appeal from a Bankruptcy Court order. Petitioners merely chose to misapply the wrong set of rules.

Judge Gershon, in her June 19, 2003 Order, stated that the Novaks "although proceeding on this appeal *pro se*, are well-versed in the Bankruptcy Court's rules and procedures, having filed at least four previous bankruptcy applications and at least one previous federal district court appeal." This Court should not grant Petitioners' writ of certiorari for the simple reason that they misapplied a clearly-stated Bankruptcy Rule and should have known better.

C. THE "EXCUSABLE NEGLECT" STANDARD HAS NOT BEEN MET IN THIS INSTANCE

The Novaks cannot show excusable neglect for their failure to timely file their Notice of Appeal dated November 12, 2002. Bankruptcy Rule 8002(c) allows for an extension of time to file a notice of appeal when there is excusable neglect and when the request for an extension has been made in writing within twenty days after the expiration of the time to file the notice. The Novaks did not make a request for an extension of time. Thus, an exception for excusable neglect does not apply in this case and does not change the determination that the November 12, 2002 Notice of Appeal was untimely filed.

Chief Judge Michael B. Mukasey of the United States District Court for the Southern District Court of New York confirmed that "at least three different courts have held, under nearly identical circumstances, that when a litigant misses the deadline in which to file a bankruptcy appeal because he

relies on FED. R. CIV. P. 6(a) instead of FED. R. BANKR. P. 9006(a), there is no excusable neglect." *In re Singer Co. N.V., et al.*, 2002 WL 10452, *3 (2002) (citing *HML II, Inc. v. Ginley (In re HML II, Inc.)*, 234 B.R. 67, 71-73 (B.A.P. 6th Cir. 1999); *Hartford Cas. Ins. Co. v. Food Barn Stores, Inc. (In re Food Barn Stores, Inc.)*, 214 B.R. 197, 200-01 (B.A.P. 8th Cir. 1997); *Auto Specialties Mfg. Co. v. Sachs (In re Auto Specialties Mfg. Co.)*, 133 B.R. 384, 391-92 (Bankr. W.D. Mich. 1991)).

Moreover, the lower courts' refusal to consider Bankruptcy Rule 8002(c) and apply excusable neglect in the cases relied on in the *Singer* case was not an abuse of their discretion because the lower courts followed clearly-stated Bankruptcy Rules in reaching their decisions. In the Novaks' case, Petitioners never made a written request for an extension of time to file a notice of appeal. In fact, Petitioners' argument, that the lower courts abused their discretion in issuing their decisions, is nothing more than a bald assertion.

The Novaks erroneously rely on *Pioneer Investment Services v. Brunswick Assoc.*, 113 S. Ct 1489 (1993) to convince this Court to grant their Petition. The circumstances in *Pioneer* bear no semblance to the facts in the Novaks' matter. In *Pioneer* this Court determined that the actions of counsel for a creditor, coupled with an ambiguous notice of a bar date, together with the innocence of that unsecured creditor in its reliance on its counsel's advice, were sufficient bases on which to find that the creditor missed the deadline due to "excusable neglect."

Further, a simple reading of Bankruptcy Rule 9006(b), which permits the enlargement of time after that time has

passed, notes that the enlargement of time is limited under Rule 8002. The enlargement of time within which to file an appeal from a Bankruptcy Court order under Bankruptcy Rule 8002(c)(2) may be granted only when a motion to extend that time is filed "not later than 20 days after the expiration of the time for filing a notice of appeal . . . upon a showing of excusable neglect."

The Novaks never filed a motion to enlarge their time to appeal the Bernstein Decision and have failed to show any excusable neglect either as to their failure to timely file or their failure to timely file a motion to enlarge their time to appeal.

CONCLUSION

For these reasons, the Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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